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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 326

RALPH LASSITER AND T. W. LEE,
Petitioners,

vs.

EDWARD ROOS AND JOHN A. ROOS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray for the issuance of a Writ of Certiorari to review the judgment below of the United States Court of Appeals for the Fifth Circuit.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). The judgment below was rendered April 18, 1951. A petition for rehearing was denied June 20, 1951.

Opinion Below

The opinion below may be found in the record at page 403. It is reported in 188 F. (2) at p. 427.

Question Presented

Whether the District Court had jurisdiction of a suit removed on the ground of diversity from the District Court of Cameron County, Texas, where a third defendant, Wimberly McLeod, a tenant in possession, was a citizen of Texas and the relief asked included foreclosure and sale of the land under a mechanic's lien.

Statement

Petitioners sued respondents in the State Court for money due under a contract for clearing and grubbing some 1600 acres of land. Petitioners were citizens of Texas; respondent Edward Roos was a citizen of New York (R. 6); John Roos was a citizen of Pennsylvania. The complaint asked a money judgment, impressing a mechanic's lien upon the land, foreclosure and sale. Wimberly McLeod, a citizen of Texas, was the Roos' local agent and was alleged to have made the contract in suit (R. 8). The complaint also alleged that McLeod had an interest in the subject-matter of the suit, in the contract and in the land and was in possession of the land by agreement with the Roos' (R. 8). Plaintiffs did not know the terms of McLeod's agreement or the exact nature of his claim to the land. McLeod's contract with the Roos' was alleged to antedate Petitioner's contract to clear the land; so too his possession of the land over which he continued to exercise control (R. 8, 9). It was alleged that McLeod "approved the payments for money due for work done, and acted thruout as the quasi-owner of such land, and was in actual possession of same and exercised and still exercises the prerogatives of possession in and over the

hereinafter described land" (R. 9). It was also alleged that McLeod had rented portions of the land to tenants Hext, Campbell and Lamon who were in possession (R. 9) and who were residents of Texas and named as defendants (R. 7). The complaint alleged that McLeod:

> "is a proper, necessary, and indispensable party to this Cause in order that his rights based upon possession of the land, interest in the contracts with the owner, of the owner with the Plaintiffs, and with tenants of the land, as well as any and all other rights and claims which the said Defendant, Wimberly McLeod, may have but which are not known in detail to these Plaintiffs, may be properly adjudicated and disposed of in this Cause."

Pursuant to Texas law Petitioners filed and perfected a mechanic's lien against the property (R. 18). The relief asked was a money judgment and foreclosure and sale of the land under the mechanic's lien (R. 19).

The respondent Roos removed the case on the ground of diversity (R. 23) alleging the complaint alleged no cause of action against McLeod (R. 21-22) and that he had no interest in the land or the contract to clear it (R. 23). The removal petition made no mention of the other tenants in possession. The Federal court allowed the removal and Petitioners later filed a motion to remand for lack of jurisdiction, the motion being based upon the allegations of the Amended Complaint (R. 56). In the meantime McLeod filed a motion to dismiss. The Federal Court acted on the motion to remand and McLeod's motion to dismiss in a single order dated January 11, 1949, denying the motion to remand. As to the motion to dismiss the order stated:

> "And it appearing that the motion of Defendant Wimberly McLeod, to be dismissed, was prematurely filed, it is hereby overruled in order that the entire case may be removed and this Court enabled to deter-

mine all issues herein, or, in its discretion, to remand matters not otherwise within its original jurisdiction to said State District Court."

The latter suggests the Court may have thought the case removable as a separate controversy under 28 U.S.C. Sec. 1441(c). At the trial, before a different Federal judge, the Court expressed doubt as to the right to remove, "where you have got an original Defendant who is a necessary party to the suit" (R. 102), *i.e.*, McLeod (R. 103). Counsel for defendants claimed the first Federal judge ruled the case was removable because McLeod had no interest in the controversy and "had no possession". Plaintiffs' counsel pointed out the complaint alleged McLeod was, in fact, in possession (R. 103). The Court allowed the case to stand as properly removed (R. 104-5; Concl. of law 1, R. 389). The judgment granted recovery to Plaintiffs of $26,977.72 and foreclosure of the mechanic's lien (R. 398).

The judgment was reversed on appeal (R. 408), the Court of Appeals holding that under the clearing contract time was of the essence and that as the job had not been done on time the plaintiffs could only recover on a *quantum meruit*. The case was remanded for further proceedings.

On appeal Petitioners did not raise the jurisdictional question. This is understandable as Petitioners had won below and naturally did not wish to impeach their own judgment. Under *American Fire & Casualty Insurance Co.* v. *Finn*, 341 U. S. 6, 95 L. Ed. 473, see also *Mansfield C. D. L. M. R. Co.* v. *Swann*, 111 U. S. 329, 383, no such harsh requirement precludes Petitioners raising the point in this Court.

Reasons for the Allowance of the Writ

Under *Erie Railroad* v. *Tompkins*, 304 U. S. 64, whether a given party is necessary or indispensable to foreclosure

proceedings under Texas Civil Statutes, Sec. 5452, is a question of State law. Under Texas law tenants in possession are necessary parties in mechanic's lien foreclosure proceedings (*Veal* v. *Thompson,* 159 S. W. (2nd) 472, 477; *Logan* v. *Ludwick,* 283 S. W. (2nd) 548, 550; *Cook* v. *Spivey,* 174 S. W. (2nd) 634, 635; for Texas policy as to parties see 67 C. J. S. Sec. 49). They are at least necessary to a complete disposition of the case (*Brown* v. *Meyers,* 163 S. W. (2nd) 886). Here the trial court, faced with McLeod's Texas citizenship, undertook to ignore him for jurisdictional purposes, but retained him in the case "in order that the entire case may be removed and this Court enabled to determine all issues herein, or, in its discretion, to remand matters not otherwise within its original jurisdiction" (R. 59). We know of no precedent for such an action, which is clearly an illegal expansion of the diversity jurisdiction.

It seems clear the case is not removable under 28 U.S.C. Sec. 1441(c) as a separate controversy, there being no separate cause of action against McLeod and only one recovery being asked (*American Fire & Casualty Insurance* v. *Finn,* 341 U. S. 6, 95 L. Ed. 473).

The present case therefore shows lack of jurisdiction in the trial court and a substantial departure from the accepted and usual course of judicial proceedings (Rule 38 (5)(b) this Court's rules). This Court has always shown itself sensitive to jurisdictional excesses below (*American Fire & Casualty* v. *Finn,* 341 U.S. 6, 95 L. Ed. 473; *Pullman Co.* v. *Jenkins,* 305 U.S. 534, 542).

As to a possible claim that Petitioner did not raise the point in the Court of Appeals below, he could hardly have been expected to do so, having won the case in the trial court. Lack of jurisdiction, however, may be at any time suggested, and as the *American Fire & Casualty* case, and

Mansfield R. Co. v. *Swann, supra,* indicate, even by the party responsible for the jurisdictional defect.

It is submitted the Writ should be granted to set right an obvious jurisdictional abuse.

Conclusion

The Writ should be granted, the judgment below reversed and the cause remanded to the State court.

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